STATE OF MICHIGAN

COURT OF APPEALS

DEENA M. MILVERT,

Plaintiff-Appellant,

v

POT #26, INC., D/B/A SPRING LAKE ORCHARD MARKET, and KEVIN ALLMAN,

Defendants-Appellees.

UNPUBLISHED
April 24 2001

No. 223222
Ottawa Circuit Court
LC No. 98-031322-NZ

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant Kevin Allman's motion for summary disposition pursuant to MCR 2.116(C)(10) and an earlier order granting defendant Pot, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

This case arises out of an accusation of larceny by defendant Pot's employees against plaintiff, which subsequently led to plaintiff's detainment and questioning by defendant Allman, an Ottawa County deputy sheriff. Defendant Pot operated the Spring Lake Orchard Market (Market) where the larceny occurred. Plaintiff filed claims of slander, false imprisonment, and intentional infliction of emotional distress against defendant Pot. Plaintiff filed claims of false arrest and intentional infliction of emotional distress against defendant Allman.

Plaintiff first claims that the trial court erred in dismissing the action against defendant Pot pursuant to MCR 2.116(C)(8) because plaintiff sufficiently pleaded claims for slander, false imprisonment, and intentional infliction of emotional distress. We review rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999).

MCR 2.116(C)(8) provides for summary disposition on the grounds that the opposing party has failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All factual allegations in support of the claim are accepted as true and are construed in a light most favorable to the nonmoving party. *Id.* at 119.

To establish a cause of action for defamation, the plaintiff must show:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Burden v Elias Bros Big Boy Restaurants,* 240 Mich App 723, 726; 613 NW2d 378 (2000).]

At common law, words charging the commission of a crime are considered defamatory per se and the injury to the defamed person's reputation is presumed. *Id.* at 727-728. However, our legislature, in MCL 600.2917; MSA 27A.2917, has limited damages in a slander action where a merchant accuses a patron of stealing from a store. Consequently, a civil action against a merchant for slander, that arises out of conduct involving a person suspected of committing a larceny within the store, must fail unless the claimant proves that the merchant acted unreasonably. MCL 600.2917; MSA 27A.2917.

Furthermore, Michigan law clearly states that information given to a police officer, regarding criminal activity, is absolutely privileged. *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 619; 396 NW2d 809 (1986). In the instant case, plaintiff alleged that defendant Pot's employees made false statements to defendant Allman, a police officer, that accused plaintiff of larceny. Since this communication was absolutely privileged, plaintiff failed to state a cause of action for slander and the trial court properly dismissed the slander claim pursuant to MCR 2.116(C)(8).

The trial court also held that defendant Pot's actions did not result in the false imprisonment of plaintiff. If false imprisonment occurred, it was due to defendant Allman's actions. Consequently, the trial court stated that plaintiff failed to make any allegations of false imprisonment that pertained to defendant Pot. A mere statement of plaintiff's conclusions, that are unsupported by allegations of fact, does not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

False imprisonment has been defined by this court as an unlawful restraint on a person's liberty or freedom of movement. *Clark v K-Mart Corp*, 197 Mich App 541, 546; 495 NW2d 820 lv den 443 Mich 862; 505 NW2d 581 (1993). An individual that proximately causes a false imprisonment can also be held liable for false imprisonment. 9 Michigan Civil Jurisprudence, False Imprisonment, § 7, p 574. However, our Supreme Court has expressed that "'[i]t is not enough for instigation that the actor has given information to the police about the commission of a crime, or has accused the other of committing it, so long as he leaves to the police the decision as to what shall be done about any arrest, without persuading or influencing them.'" *Lewis v Farmer Jack Division, Inc*, 415 Mich 212, 219 n 3; 327 NW2d 893 (1982) (quoting 1 Restatement Torts, 2d, § 45A, Comment c, p 70).[1]

---

[1] Plaintiff cites to *Adams v National Bank of Detroit*, 444 Mich 329; 508 NW2d 464 (1993) (plurality opinion), as authority for her proposition that defendant Pot committed false imprisonment by carelessly or mistakenly charging plaintiff with larceny. However, the present

(continued…)

Plaintiff does not claim that defendant Pot did anything more than accuse plaintiff of committing a larceny. Absent any claim that defendant Pot directed or persuaded the police to make an arrest, plaintiff has failed to state a claim upon which relief could be granted. Moreover, without an actual arrest by defendant Allman, there can be no false imprisonment claim against defendant Pot. See *Clarke, supra* at 547. In her complaint, plaintiff alleges that defendant Allman "threatened her with arrest."

Plaintiff also argues that the trial court erred when it dismissed her intentional infliction of emotional distress claim. To establish a valid claim of intentional infliction of emotional distress the plaintiff must show: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Graham v Ford,* 237 Mich App 670, 674; 604 NW2d 713 (1999). However, liability for this claim requires that the conduct be so outrageous and extreme that it would be considered intolerable in a civilized society and would lead an average member of the community to exclaim, "Outrageous!" *Id*. at 274-275.

Plaintiff's complaint alleged that defendant Pot's employees falsely accused plaintiff of larceny and that this accusation was without cause, reckless, careless, and malicious. Plaintiff also stated that since the incident she has undergone treatment for her distress and has had difficulty meeting her family obligations. In the context of a (C)(8) motion, the question becomes whether the allegation was sufficiently extreme and outrageous, when viewed in a light most favorable to plaintiff, to state an actionable claim. The trial court held that the facts alleged by plaintiff could not be deemed outrageous and that the level of distress was not so severe that no reasonable man could be expected to endure it. We agree.

Initially, as a matter of law, the court must determine if a defendant's conduct could be reasonably regarded as extreme and outrageous as to permit recovery. *Teadt v Lutheran Church Missouri Synod,* 237 Mich App 567, 582; 603 NW2d 816 (2000). If reasonable minds could differ, then a jury must determine if the conduct was extreme according to the particular facts of the case. *Id*. After viewing the claim in a light most favorable to plaintiff, we do not believe that a trier of fact could conclude that defendant Pot's conduct rose to an extreme or "outrageous" level.

In *Hall, supra* at 616-617, this Court rejected the plaintiffs' claim for intentional infliction of emotional distress where the defendant's employee merely filed a complaint with police against the plaintiffs. The *Hall* panel found no evidence of intent to cause the plaintiffs to suffer the requite emotional distress where the defendant's employee did no more than file a complaint with law enforcement officials. *Id.* at 617. Moreover, even in *Adams, supra* at 333 n

---

(…continued)

case is factually distinct from *Adams* because defendant Pot did not conduct its own security investigation and provide a report to police. In *Adams*, the police officer claimed that he treated information from security departments differently than information received from ordinary citizens. *Id*. at 341-342. Moreover, contrary to plaintiff's contention that this Court must follow the *Adams* decision, "a plurality decision in which no majority of the participating justices agree concerning the reasoning is not binding authority under the doctrine of stare decisis." *Burns v Olde Discount Corp,* 212 Mich App 576, 582; 538 NW2d 686 (1995).

4, a case that plaintiff heavily relies upon in her brief, Justice Levin stated that "[t]he mistake in identifying Adams as the culprit was [not] 'outrageous' . . . " enough to maintain an intentional infliction of emotional distress action. Thus, the trial court did not err in granting defendant Pot's motion for summary disposition pursuant to MCR 2.116(C)(8) on the intentional infliction of emotional distress claim.

As to defendant Allman, plaintiff argues that the trial court erred in granting his motion for summary disposition pursuant to MCR 2.116(C)(10), because factual issues remained that concerned plaintiff's claims of false arrest and intentional infliction of emotional distress.

Summary disposition of a claim may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). All affidavits, pleadings, depositions, admissions, and other documentary evidence is viewed "in the light most favorable to the party opposing the motion." *Smith*, *supra* at 454. A trial court's grant or denial of summary disposition is reviewed de novo on appeal to see if the moving party was entitled to judgment as a matter of law. *Id.*

A false arrest is an illegal or unjustified arrest, and the guilt or innocence of the person arrested is irrelevant. *Lewis*, *supra* at 218. In order to prevail on a claim of false arrest, the plaintiff must show that an arrest was made without probable cause. *Blase v Appicelli*, 195 Mich App 174, 177; 489 NW2d 129 (1992). There is no false arrest if the plaintiff voluntarily agrees to stay with the defendant. *Clarke*, *supra* at 547. In *Bruce v Meijers Supermarkets, Inc*, 34 Mich App 352, 356; 191 NW2d 132 (1971), this Court, quoting *People v Gonzales*, 356 Mich 247, 253; 97 NW2d 16 (1959), stated:

> "An arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. The act relied upon constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested."

While manual seizure is not required, at the very least there must be some form of personal coercion to establish a claim of false imprisonment.[2] *Clarke*, *supra* at 546-547. Defendant

argues, and the trial court agreed, that looking at the facts most favorably to plaintiff, there was no illegal restraint sufficient for a false arrest claim. We agree.

---

[2] False arrest and false imprisonment, while technically different, are distinguishable mainly in terminology. *Lewis*, *supra* at 231 n 4 (Williams, J., dissent). "'Thus, it has been stated that false arrest and false imprisonment are not separate torts, and that a false arrest is one way to commit false imprisonment; since an arrest involves a restraint, it always involves imprisonment.'" *Id.*, quoting 32 Am Jur 2d, False Imprisonment, § 2, pp 59-60.

There was never a formal arrest, with plaintiff being taken to jail, and plaintiff admitted in her deposition that she voluntarily entered defendant Allman's police car. Moreover, when plaintiff was in defendant Allman's vehicle she never made a request to leave. At some point during the interview in the police car, plaintiff suggested they continue the questioning at her home. Defendant Allman opened the door of his vehicle so plaintiff could ride home with her husband. No evidence suggests that defendant Allman entered plaintiff's home forcibly or against her will. Plaintiff admitted that defendant Allman never physically interfered with her freedom or touched her in any way. In fact, each time defendant Allman questioned plaintiff, she ended the conversation and was able to leave without any interference by defendant Allman.

However, even if reasonable minds could differ as to whether plaintiff was arrested, there is no issue of fact that defendant Allman had probable cause to detain plaintiff. Probable cause is a reasonable suspicion that is supported by circumstances which would warrant a cautious man to believe that the person accused is actually guilty. *People v Whittaker*, 187 Mich App 122, 126; 466 NW2d 364 (1991). In a similar case, our Supreme Court dismissed an action for false arrest and stated that the officer, who acted on information and identification obtained from a store employee, had probable cause to make an arrest. *Lewis, supra* at 218.

In the present case, plaintiff alleged that defendant Pot's employees falsely accused plaintiff of committing a larceny and that this led defendant Allman to detain and question plaintiff. Thus, there is no issue of fact that defendant Allman had probable cause to stop and question plaintiff, as he was advised by market employees that plaintiff had committed a larceny. Plaintiff presented no documentary evidence which indicated that defendant Allman detained plaintiff for reasons other than the accusations by witnesses at the market. Therefore, the trial court properly dismissed the false arrest claim against defendant Allman.

Plaintiff also argues that defendant Allman intentionally inflicted emotional distress.[3] Plaintiff bases this claim on the fact that defendant Allman accused her of committing larceny, detained her in his car and in her bedroom, searched her laundry room, attempted to obtain plaintiff's confession in front of her children, accused her of lying, and threatened her with two to five years in prison because she committed a felony. However, defendant Allman maintains, and the trial court agreed, that calling a suspect a liar and reminding a suspect about criminal penalties, if for public policy reasons alone, does not create an actionable claim for intentional infliction of emotional distress. We agree.

In the context of a police officer confronting and questioning a criminal suspect, we hold that defendant Allman's actions were not sufficiently extreme and "outrageous" to sustain an action based on intentional infliction of emotional distress. Defendant Allman was provided information that indicated plaintiff had committed a larceny. If the police were held liable for challenging suspect's stories and threatening them with prison time, it would place an unacceptable chill on police efforts to interrogate suspects and fight crime. In *Killian v Fuller,* 162 Mich App 210, 216-217; 412 NW2d 698 (1987), this Court stated:

---

[3] The requirements for the intentional infliction of emotional distress were discussed at length earlier in this opinion.

> [W]hen a complaint alleges that a police officer's conduct amounts to no more than an insistence on a "legal right in a permissible way," the claim fails because the elements of outrageous conduct and a reckless or intentional state of mind are deficient. Therefore, in order to sustain plaintiff's claim, it was necessary to show that defendants' conduct giving rise to an entrapment defense exceeded the bounds of what the police could legally do. [Citations omitted.]

Thus, when an individual merely insists upon their legal rights, even though they may be aware that emotional distress will result, there is no cause of action for the intentional infliction of emotional distress. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 81; 480 NW2d 297 (1991). Clearly, Defendant Allman's questioning of plaintiff as a potential suspect, while perhaps relentless, did not exceed his legitimate authority.

Finally, while plaintiff argues in support of a slander claim against defendant Allman, the complaint does not appear to include a slander claim against defendant Allman. Moreover, neither the trial court or defendant Allman address a slander claim. In fact, plaintiff's counsel stated that the only claims against defendant Allman were false arrest and intentional infliction of emotional distress. An issue is not properly preserved for appellate review if it is not raised before and addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper